

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

TIMOTHY J. BRITT,

Petitioner,

vs.

SCOTT FRAKES,

Respondent.

**8:21CV474**

**MEMORANDUM AND ORDER**

This matter is before the court on Petitioner’s Motion for Leave to Amend (filing 14) and Motion for Discovery (filing 15).

First, Petitioner seeks leave to amend his habeas petition and has attached the proposed amended habeas petition to his motion. (Filing 14.) Petitioner states that he “seeks to add exhibits [A through H] to the petition without changing any of the arguments.” (*Id.* at CM/ECF p. 1.) The court has reviewed the proposed amended petition and determined that the petition is identical to the current operative petition in Filing 9 with the only difference being the addition of Exhibits A through H. (*Compare* Filing 9 with Filing 14-1.) Upon consideration, the court will grant Petitioner’s Motion for Leave to Amend to the extent that the court will consider Exhibits A through H (filing 14-1 at CM/ECF pp. 11–30) of the proposed amended petition as supplemental to Petitioner’s Amended Petition (filing 9) filed on March 21, 2022. *See* NECivR 15.1(b) (“In considering pro se litigants’ amended pleadings, the court may consider the amended pleading as supplemental to, rather than as superseding, the original pleading, unless the pleading states that it supersedes the prior pleading.”) Filing 9, the Amended Petition, remains the operative petition.

Petitioner has also filed a Motion for Discovery in which he seeks “all information filed in connection with Exhibits C, D, E, F, G, and H” which he

attached to his motion to amend discussed above. (Filing 15.) Petitioner asserts the discovery is needed to allow him to “offer the complete facts and develop a proper record before this court” and because some of the “information has been lost and misplaced” during his transfers between prison facilities. (*Id.* (spelling corrected).)

“A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of course.” *Williams v. Steele*, 2013 WL 5838727, at \*2 (E.D. Mo. Oct. 30, 2013) (citing *Bracy v. Gramley*, 520 U.S. 899, 904 (1997)). Rule 6 of the Rules Governing Section 2254 Cases in the United States District Courts provides that “[a] judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery.” As set forth in the court’s progression order (filing 10), Respondent is required to file any necessary state court records in support of a motion for summary judgment or, if Respondent elects to file an answer, all state court records relevant to Petitioner’s claims. The progression order also provides a procedure through which Petitioner may seek additional records if he deems the designation of state court records insufficient or needs additional records from the designation. Specifically, the progression order states:

In the event that the designation of state court records is deemed insufficient by Petitioner or Petitioner needs additional records from the designation, Petitioner may file a motion with the court requesting additional documents. Such motion must set forth the documents requested and the reasons the documents are relevant to the cognizable claims.

(*Id.* at CM/ECF pp. 3, 4–5.)

Here, Respondent has not yet filed a motion for summary judgment with supporting state court records or state court records in support of an answer.<sup>1</sup>

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<sup>1</sup> Respondent has until June 16, 2022, to file state court records in support of an answer or a motion for summary judgment.

Accordingly, the court finds a lack of good cause for discovery at this time and will deny Petitioner's discovery motions as premature.

IT IS THEREFORE ORDERED that:

1. Petitioner's Motion for Leave to Amend (filing 14) is granted to the extent the court will consider Exhibits A through H (Filing 14-1 at CM/ECF pp. 11–30) as supplemental to Petitioner's Amended Petition (filing 9).
2. The clerk of the court is directed to add the following docket text to the already-existing text at Filing 14: "Court will consider CM/ECF pages 11–30 of Filing 14-1 supplemental to the Amended Petition (Filing 9)."
3. Petitioner's Motion for Discovery (filing 15) is denied without prejudice to reassertion.

Dated this 9th day of June, 2022.

BY THE COURT:



Richard G. Kopf  
Senior United States District Judge